

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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JAN 14 1976
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FILE: B-158371

DATE:

MATTER OF:

National Sea Grant Program--indirect cost rates.

DIGEST:

1. Although, normally, the Comptroller General of the United States General Accounting Office (GAO) would not render a decision to a question of law submitted by a certifying officer unaccompanied by a voucher as required by 31 U.S.C. § 82d, (1970), the statutory authority under which the GAO renders decisions to certifying officers, since the question submitted is general in nature and will be a recurring one, the reply to the question raised is addressed to the head of the agency under the broad authority contained in 31 U.S.C. § 74, (1970), pursuant to which the GAO may provide decisions to the heads of departments on any question involved in payments which may be made by that department.
2. Section 204(d)(2) of National Sea Grant College and Program Act of 1966, which prohibits Federal funding for purchase or rental of land, or purchase, rental, construction, preservation or repair of building, dock or vessel applies only to Federal grant payments for direct costs for listed categories. This section does not prohibit payments computed by using standard indirect overhead cost rates, even though such rates may include factors technically attributable to prohibited categories.

This is a response to a request for a decision from Mr. William G. Dodds, Authorized Certifying Officer, National Oceanic and Atmospheric Administration (NOAA), concerning the National Sea Grant Program, established by the National Sea Grant College and Program Act of 1966, approved October 15, 1966, Pub. L. No. 89-688, 80 Stat. 998, as amended, 33 U.S.C. §§ 1121 et seq.

At the outset we refer to 31 U.S. Code § 82d, (1970), the statutory authority under which this Office renders decisions to certifying officers, which provides as follows:

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"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification."

Under the above-quoted authority, a certifying officer is entitled to a decision by the Comptroller General on a question of law involved in payment on a specific voucher which has been presented to him for certification prior to payment of the voucher, which should accompany the submission to this Office. 21 Comp. Gen. 1128 (1942).

In the instant case, no voucher accompanied the request for decision and the question presented is general in nature. Normally, we would not render a decision under such circumstances. However, in view of the fact that the problem involved in the instant situation will be of a recurring nature, we are rendering our decision under the broad authority contained in 31 U.S.C. § 74, (1970), pursuant to which we may provide decisions to the heads of departments on any question involved in payments which may be made by that department.

The programs authorized by the Act were originally administered by the National Science Foundation, but all of the functions vested in the National Science Foundation were transferred to the Secretary of Commerce, to be administered by NOAA, by section 1(d) of Reorganization Plan No. 4 of 1970, 84 Stat. 2090.

The Act authorizes, inter alia, grants to public and private institutions of higher education to fund education, research demonstration, and information-publication activities relating to development of marine resources. Section 204(d)(2) of the Act, as amended, 33 U.S.C. § 1123(d)(2) (Supp. III, 1973), provides as follows (quoting from the Code):

"No portion of any payment by the Secretary [of Commerce] to any participant in any program to be carried out under this subchapter shall be applied to the purchase or rental of any land or the rental, purchase, construction, preservation, or repair of any building, dock, or vessel: Provided, That the

prohibitions of this paragraph shall not apply to non-self-propelled habitats, buoys, platforms, or other similar devices or structures, used principally for research purposes."

In accordance with this statutory prohibition no Federal payments for direct costs attributed to the listed categories have been permitted in Sea Grants. Federal Management Circular 73-7, 34 C.F.R. Part 254 (1975) ("Cost Principles For Educational Institutions"), App. A, paragraph D-1 defines "direct costs" as follows:

"Direct costs are those costs which can be identified specifically with a particular research project, an instructional activity or any other institutional activity or which can be directly assigned to such activities relatively easily with a high degree of accuracy."

Paragraph D-2 states that "Identifiable benefit to the research work rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect costs of research agreements . . ." Paragraph E-1 defines "indirect costs" as follows:

"Indirect costs are those that have been incurred for common or joint objectives and, therefore, cannot be identified specifically with a particular research project, an instructional activity, or any other institutional activity. At educational institutions such costs normally are classified under the following functional categories: General administration and general expenses; research administration expenses; operation and maintenance expenses; library expenses; and departmental administration expenses."

Pursuant to Federal Management Circular 73-6, 34 C.F.R. Part 252, (1975) ("Coordinating Indirect Cost Rates and Audit of Educational Institutions") indirect cost rates at educational institutions receiving grants under various programs, including the National Sea Grant Program, have been computed in order to establish rates for uniform application to Federal grant and procurement programs. However, in view of section 204(d)(2) of the Act, recent audit reports from Department of Commerce auditors to the NOAA Grants Officer have questioned the propriety of using standard indirect cost rates in awarding Sea Grant funds since, technically, a certain percentage of the standard indirect cost rates can be attributed to such items as the rental, purchase or preservation of buildings or vessels, and the auditors argue that such a result is prohibited by the statutory provision. Accordingly, the question presented for our decision is whether Congress intended that section 204(d)(2) impose an absolute prohibition on any standard indirect cost rate funds being applied toward the prohibited items.

The submission to our Office recites the following background information and considerations with respect to this question:

"* * * Department of Commerce auditors have recommended to the NOAA Grants Officer that separate accounting systems and indirect cost rates be established at each institution receiving grants under the National Sea Grant Program, in order to remove these items from the allowable costs comprising the indirect cost pool. Copies of pertinent letters are enclosed.

"An analysis of the efforts required to implement this recommendation indicates that it would create a substantial burden on both NOAA and the institutions involved. Initial discussions with certain grantee institutions have revealed an inclination on their part to withdraw from the program rather than undertake such a burdensome arrangement. Furthermore, officials of the National Sea Grant Program and other offices in NOAA question whether such a result was actually intended by the above statutory provision, or whether the recommended action would in fact accomplish the end intended.

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"* * * an evaluation of the consequences resulting from the suggested interpretation of this statute would indicate that such was not intended by Congress when it originally passed the statute. For instance, this interpretation would mean that every purchase by grantees of the National Sea Grant Program must be thoroughly analyzed and subjected to cost breakdown, since some portion of the purchase price thereof eventually would go toward those portions of the manufacturer's costs which would appear to be prohibited by a literal reading of the above statutory provision. Such an approach is obviously unreasonable and would be impossible to administer. Yet, once the agency and affected institutions became involved in analyzing indirect costs, we see no basis for determining a point at which such an analysis would no longer be required.

"As already indicated, the burden associated with the establishment of new and separate accounting systems at each institution for identifying indirect costs would be practically insurmountable for both NOAA and the affected institutions. Few institutions possess the same accounting system or determine their indirect costs in the same manner. Since the normal, established indirect cost rates would be unavailable under such an arrangement, a complete analysis for each institution would have to be made each year before a grant could be issued, or certification for payment under a grant could be made by this office. * * *

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"It would appear to be a much more reasonable approach for the National Sea Grant Program and NOAA to continue to follow the policy, as established in Federal Management Circular 73-6, which provides for uniformity of indirect cost rates throughout the Federal Government."

A review of the legislative history of the Act reveals no evidence that Congress considered this specific problem in enacting the 1966 legislation. However, the following colloquy during debate in the House of Representatives suggests the general intent behind the provision:

"Mr. CROSS. I would like to ask the gentleman if this is a brick and mortar bill? In other words, would this bill launch us in the business of building sea-grant colleges from scratch, or is it intended that the colleges be located in already existing institutions?

"Mr. MOSHER. Mr. Chairman, the gentleman from Iowa has asked a very good question. This is intended to involve existing institutions; that is, there is no intention on the part of the committee that his bill will launch what the gentleman from Iowa calls a brick-and-mortar program of new institutions.

"Mr. LLENNON. Mr. Chairman, will my distinguished friend, the gentleman from Ohio [Mr. MOSHER], yield to me at this point?

"Mr. MOSHER. I am glad to yield to the gentleman from North Carolina.

"Mr. LENNON. Mr. Chairman, if the gentleman from Iowa will look on page 6, subsection (2), the gentleman will find the following language:

"No portion of any payment by the Foundation to any participant in any program to be carried out under this title shall be applied to the purchase or rental of any land or the rental, purchase, construction, preservation, or repair of any building, dock, or vessel.

"Mr. Chairman, that language appears beginning at line 7 on page 6 and ending on line 11 of the same page.

"Mr. GROSS. Mr. Chairman, I thank both gentlemen."
112 Cong. Rec. 22432 (1966).

Thus it was apparently the intent of the Congress in enacting section 204(d)(2) to prohibit the use of Federal funds for capital grants as such. There is no indication that Congress intended the prohibition to be so rigid as to affect the payment of indirect cost factors common to many Federal assistance programs. We would be particularly reluctant to adopt such a construction, absent support therefor in the legislative history, in view of the practical consequences described in the submission.

For the reasons stated above, it is our opinion that continued use of the standard indirect cost rates in awarding grants under the National Sea Grant Program is not inconsistent with section 204(d)(2).

Paul G. Dembling

Acting Comptroller General
 of the United States